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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 736

EVANSTON-NORTH SHORE BOARD OF REALTORS,
an Illinois not-for-profit corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner, Evanston-North Shore Board of Realtors, prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered on July 12, 1963, rehearing of which was denied by the Court of Claims on October 11, 1963.

OPINION BELOW

The opinion of the Court of Claims, printed in Appendix B hereto, is reported at 320 F.2d 375. Also reprinted in Appendix B, but not reported, are the findings of fact and conclusions of law of the Court of Claims.

JURISDICTION

The opinion and judgment of the Court of Claims was entered on July 12, 1963. R. 27. A timely motion for rehearing was filed in that Court on August 14, 1963, R. 57, and an order denying rehearing was entered by the Court on October 11, 1963. R. 79.

This Court has jurisdiction to review the judgment of the Court of Claims by writ of certiorari under the provisions of 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the legal test of exemption from federal income taxation for an organization set forth in Section 501(c)(6) of the Internal Revenue Code of 1954 is the *purpose* for which the organization exists and carries on its activities or whether the legal test is that to be exempt all of such organization's substantial activities (measured in terms of cash flow and number of employees involved) must themselves be *activities* warranting independent exemption regardless of the purpose for which the organization exists or why the activities in issue are carried on.

2. Whether an admitted real estate board loses the exemption from federal income taxation expressly granted by Section 501(c)(6) of the Internal Revenue Code of 1954 because, as part of its entire program of activities directed to the improvement of business conditions in the business of real estate brokerage, it adopts rules requiring its members to exchange information concerning listed properties and to cooperate with other members in the sale of property and undertakes certain mechanical functions in connection with the exchange of information.

STATUTES AND REGULATIONS INVOLVED

This case involves Section 501(c)(6) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(6), and Section 1.501(c)(6)-1 of the Treasury Regulations on Income Tax (1954 Code). The pertinent parts of this statute and Regulation are set forth below; their full text is reproduced in Appendix A hereto.

> Sec. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.
>
> (a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) or (d) . . . shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.
>
> . . . . .
>
> (c)(6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.
>
> Regs. Sec. 1.501(c)(6)-1 BUSINESS LEAGUES CHAMBERS OF COMMERCE, REAL ESTATE BOARDS, AND BOARDS OF TRADE.
>
> A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. . . .

STATEMENT OF THE CASE

Petitioner is an admitted real estate board of the type expressly exempted from federal income taxation by Section 501(c)(6) of the Internal Revenue Code of 1954. Tr., Willi; pp. 13, 17; R. 40, Finding No. 8. Petitioning Board had twice been ruled exempt from federal income taxes under the predecessors of Section 501(c)(6). R. 41, Findings No. 11 and 12. In 1960, however, the Commissioner of Internal Revenue revoked the prior exemption rulings regarding petitioning Board and subsequently assessed and collected income taxes against petitioning Board for the year ended June 30, 1959. R. 43-46, Findings No. 15, 16 and 17. Petitioner then brought suit in the United States Court of Claims for refund of these taxes on the grounds that they had been erroneously and illegally assessed. R. 46, Finding No. 19. The Court of Claims, which had jurisdiction of such a suit under 28 U.S.C. § 1346(a)(1) and 28 U.S.C. 1491, dismissed petitioner's suit. R. 27 *et seq.*

The grounds on which the Commissioner of Internal Revenue revoked the exemption rulings governing petitioning Board and the grounds on which the Court of Claims denied petitioning Board relief was its operation of a "multiple listing service." R. 44-45, Finding No. 16; R. 27 *et seq.* The record shows that what is referred to as petitioner's multiple listing service is, in fact, several Board rules adopted over the years which require:

1. That members of petitioning Board cooperate with other members of the Board in the sale of property exclusively listed with them. PX 3; Tr., Orth, pp. 60-61.

2. That members of petitioning Board forward to the Board within forty-eight hours of receiving a listing certain prescribed information concerning the listed property. PX 9, pp. 82-87; Tr., Orth, p. 65; McGuire, pp. 222-225.

3. That the Board receive and transmit this in-

formation to a printer who reproduces and distributes it to all Board members. PX 22; Tr., Orth, pp. 79-81.

4. That Board members arbitrate all commission disputes so that buyers and sellers of property are not brought into such a dispute between brokers. PX 9, pp. 78-80; Tr., Orth, pp. 77-78; Rumsfeld, pp. 171-172.

5. That rules of brokerage practice which provide agreed standards of business practice, including the division of commission in cooperative sales, be followed by all members. PX 9, pp. 96-100; Tr., Rumsfeld, pp. 169-171.

Most of these rules were adopted before 1953, the year in which the Court of Claims found petitioner had adopted a multiple listing system. The only rule adopted in 1953 was the rule, PX 24, requiring Board members to forward information concerning listed properties to the Board within forty-eight hours of receiving the listing. The other rules governing divisions of commissions and establishing procedures to be followed in connection with cooperative selling antedated the information exchange and were necessary to make cooperative selling practical whether or not petitioner's members exchanged information through the Board concerning their listings.

The foregoing so-called multiple listing rules, along with a number of other activities set forth in the record, are all part of an overall program of petitioning Board designed to improve, elevate and professionalize the business of real estate brokerage in the North Shore suburbs of Chicago. R. 39, 40, and 46 through 48; Findings No. 4, 9, 10, and 21 through 27. Petitioning Board was not formed nor does it exist to operate a multiple listing service or to render particular services to its members. R. 38-39; Finding No. 2. It exists and undertakes all its activities for the same exempt purposes for which it was organized.

The Revenue Service in revoking petitioner's exemption ruling and in resisting petitioner's suit for refund con-

tended that the multiple listing service was a business of a kind ordinarily carried on for profit and that it rendered particular services to petitioner's members. Further, it argued, that the multiple listing service was petitioner's primary activity because of the cash flow on petitioner's books resulting from the fees charged to defray the cost of operation of the multiple listing service and the time of petitioner's clerical employees spent in connection with it. According to the Revenue Service, the purpose for which an association is organized and carries on its activities is immaterial so long as any important activity of the association is not itself independently entitled to exemption.

Petitioner controverted the factual contentions made by the Revenue Service and also argued that the Revenue Service position did not represent the correct legal test of exemption under Section 501(c)(6). Petitioner argued before the Court of Claims that an organization named in Section 501(c)(6) is exempt so long as it is organized as a not-for-profit entity, has an overall exempt purpose and directs its activities to that exempt purpose even though some of its activities, when considered separately from the program of the organization as a whole, may be activities of a kind ordinarily carried on for profit or result in performance of particular services for the organization's members.

The Court of Claims in its opinion adopted the Revenue Service's position and dismissed petitioner's claim. It considered wholly irrelevant and made no findings whatsoever concerning the extensive proof offered by the petitioning Board concerning the history and purposes of its organization and activities and how the various rules which the Court of Claims lumped together in its concept of multiple listing assisted petitioner in achieving its purposes. Petitioner's proof showed that it was formed in 1919 for the specific purpose of improving certain designated conditions which existed in the real estate business at that time. These

were a lack on the part of real estate brokers and salesmen of the education and training necessary to carry on their businesses in an adequate and competent way, Tr., Cyrus, pp. 26-27; net listing practices, *i.e.* purchases by brokers of property from their clients at a low price for resale by the broker at a higher price, Tr., Cyrus, p. 27; a general lack of ethical practice and fair dealing on the part of many in the industry, Tr., Cyrus, pp. 28-29; distrust by one broker of another with a resultant lack of cooperation among them in the sale of properties, Tr., Cyrus, p. 27; and stealing of prospects and listings by unscrupulous brokers with the result that disputes among owners and brokers as to who had made a sale and who was entitled to commission were common, Tr., Cyrus, pp. 27-29. Also, as a result of these conditions owners frequently became legally obligated to pay more than one commission on a single sale, Tr., Cyrus, p. 29. The cumulative effect of these conditions was that owners and purchasers were reluctant to buy and sell properties through real estate brokers and brokers' services were, therefore, not sought in connection with many sales. Tr., Cyrus, pp. 28-29.

Petitioner's proof also showed that petitioner's various programs and activities bore a direct relationship to improvement of these undesirable conditions. For example, petitioner's member selection and educational program helped to improve the training, competence and standing of real estate brokers. Similarly its adoption of a Code of Ethics and procedures for enforcing this Code prevented unfair dealing, and its arbitration procedures prevented its members from claiming more than one commission against a seller of property regardless of the number of brokers involved. Among other things, the record showed that the standards of fair dealing which the petitioner thus imposed upon its members exceeded those required of them by the law of the State of Illinois. Tr., Rumsfeld, p. 182.

The various rules which the Court of Claims treated in a lump as petitioner's "multiple listing system" likewise

bore a direct connection to improvement of the conditions which petitioner was created to improve. The required exchange of information, for example, prevented the secret listing practices which previously had led to unfair dealing and disputes with owners over commissions. And the rules of brokerage practice requiring petitioner's members to permit other members to cooperate with them in the sale of properties and establishing procedures to be followed in event of cooperation made such cooperation possible and practical whereas previously cooperation had been impossible and productive of endless controversy which redounded to the detriment of the business of real estate brokerage as a whole.

And, finally, the evidence showed that as a result of petitioner's activities both buyer and seller were separately represented in real estate transactions by brokers serving their interest in more than 50% of the transactions involving residential property which were consummated in petitioner's area. Tr., Orth, pp. 69, 71, 98-100; Pearson, p. 161; Rumsfeld, p. 194. And that, as a result of petitioner's program, today real estate brokers participate in over 90% of the sales of residential property in plaintiff's area compared to a very insubstantial percentage prior to petitioner's activities. Tr., McGuire, pp. 241-242, 259.

It is petitioner's contention that the Court of Claims erred in refusing to consider this proof of petitioner's exempt purpose and the relationship of its activities to this purpose and that the Court of Claims was led into this error by its erroneous interpretation of the legal test for exemption from federal income tax which has been established by Congress in Section 501(c)(6) of the Internal Revenue Code and is reflected in the applicable Treasury Regulation.

The correct legal test is that so long as an organization is organized and continues to exist for the purpose of improving industry conditions it is entitled to exemption even though one or more of its individual activities may be

deemed to be non-exempt when considered separately from the program of the organization as a whole. This is the interpretation of Section 501(c)(6) and the applicable Treasury Regulation which has been adopted by a majority of the federal courts. See pp. 16 through 19; *infra*.

The Court of Claims, however, held in the opinion below that whenever an organization engages in an activity which is not itself exempt and that activity accounts for a substantial part of the expenses and receipts of the organization and the time of its personnel, the organization loses its exemption regardless of the continuing exempt purpose for which the organization itself exists and the exempt purposes which had led to its engagement in the non-exempt activity.[1]

The legal issue thus posed by this case raises an important question with respect to the administration of the internal revenue laws which should be resolved by this Court for the reasons shown in the succeeding portions of this petition.

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[1] The practical significance of this erroneous interpretation by the Court of Claims becomes apparent when the court's opinion is examined. Although these were the subjects of all of petitioner's evidence, there is no reference whatsoever in the opinion to the reasons why the petitioning Board now exists, what its reasons were and what it intended to accomplish by entering into its various programs, including multiple listing and what the history and reasons were for the various board rules which the court lumped together under the general compendium "multiple listing". The only discussion in the opinion is upon two limited, abstract, and, we contend, largely irrelevant issues: namely, whether "a multiple listing system" (not necessarily the petitioner's program) is operated primarily for the benefit of individual Realtors and, second, whether a substantial portion of the time of petitioner's paid employees (not petitioner's members it may be observed) and a significant portion of petitioner's receipts and disbursements, are attributable to multiple listing. Moreover, even when this discussion of receipts, expenditures and employees' time was completed, the Court of Claims did not conclude therefrom that petitioner exists for the purpose of carrying on the multiple listing service or for the purpose of rendering particular services to its members, but only that the "relative contribution to plaintiff's receipts and expenditures of its listing service, and the amount of personnel which the service requires are sufficiently substantial that the listing service cannot be regarded as an incidental activity of the Board."

REASONS FOR GRANTING THE WRIT

I.

The legal test of exemption applied by the Court of Claims under Section 501(c)(6) of the Internal Revenue Code of 1954 presents an important question of interpretation of the exemption provisions of the internal revenue laws which has not been, but should be, settled by this Court because of the differing interpretation of the test of exemption under this and related sections of the revenue laws espoused by the Internal Revenue Service and that applied by many federal courts.

Section 501 of the Internal Revenue Code of 1954, 26 U.S.C. § 501, grants exemption from federal income taxation to a number of organizations, associations and corporations. Some of these organizations are exempted without any restriction, but others are exempted only when they meet certain additional qualifications. Three classes of organizations covered by Section 501(c) share some common or close to common additional qualifications for exemption:

> Section 501(c)(3)—Those ". . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . ."
>
> Section 501(c)(6)—"Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."
>
> Section 501(c)(7)—"Clubs organized and operated exclusively for pleasure, recreation, and other non-

profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder."

All of the above organizations, to be exempt, must meet the common requirements that they be organized for a specific exempt purpose[2] and that no part of their net earnings inure to the benefit of any private individual.

The Internal Revenue Service, in a widespread attempt to restrict the express exemption given these various organizations by Congress, has attempted to add an additional requirement for exemption, namely, that to retain their exemption the organizations may not engage in any "substantial" activity which is not itself entitled to exemption independently of the organization carrying it on. The Revenue Service has then established the measure of what is and what is not a substantial activity by the accounting devices of the cash flow resulting from a particular activity and the amount of time of the organization's employees devoted to the activity. If an otherwise exempt organization undertakes a substantial (in these accounting terms) activity which is not itself independently exempt, the Revenue Service contends that the organization loses its express exemption regardless of the organization's over-all exempt purpose and regardless of how that particular activity implements the organization's exempt purpose. This position of the Internal Revenue Service is well illustrated by Rev. Rul. 59-234, 1959-2 C.B. 149, regarding so-called multiple

[2] In the case of 501(c)(6) the exempt purpose of promoting a common business interest is set forth not in the statute but in the applicable Treasury Regulation, § 1.501(c)(6)-1, which has remained unchanged since 1929 and has the force of statutory law. *Automotive Electric Ass'n* v. *Commissioner*, 168 F.2d 366, 367 (C.A. 6); *Apartment Operations Ass'n* v. *Commissioner*, 136 F.2d 435, 436 (C.A. 9).

listing as carried on by real estate boards,[3] which Revenue Ruling is reprinted in Appendix C hereto.

Within the last two years the lower federal courts have on three occasions been presented with the Internal Revenue Service's gratuitously added requirement for exemption under these comparable provisions of Section 501(c) and have rejected it uniformly. In *Passaic United Hebrew Burial Ass'n* v. *United States*, 216 F. Supp. 560, the District Court for New Jersey rejected the Revenue Service's argument that an organization which conducted orthodox Jewish burials for a fee for those who could pay (roughly 38 per cent being charged a fee that resulted in a "profit") and free for those who could not (roughly 2½ per cent of all its burials) had lost its exempt status under Section 501(c)(3) because it was engaged in a commercial undertaking and burial enterprise. In *American Institute of Interior Designers* v. *United States*, 208 F. Supp. 201, the District Court for the Northern District of California rejected the Revenue Service's argument that an organization of interior decorators had lost its exempt status under Section 501(c)(6) because it conducted a trade show which accounted for from 96 to 97 per cent of its income and from 73 to 75 per cent of its expenses. In *Fort Worth Club of Fort Worth, Texas* v. *United States*, 218 F. Supp. 431, the District Court for the Northern District of Texas rejected the Revenue Service's argument that a downtown men's club had lost its exemption under Section 501(c)(7)

[3] There are substantial differences between the "multiple listing system" described in Rev. Rul. 59-234 and petitioner's rules relating to exchange of information regarding listed properties and co-operation in the sale of them. In fact, the record before the Court of Claims showed there was no one form of "multiple listing system." DX 8, p. 9.

because it received substantial income from the rental of commercial space in its clubhouse building.

In spite of these decisions—two of which it has not seen fit to appeal[4]—the Revenue Service has not lessened its attack on the exempt status of any organization engaging in an activity which is not itself exempt; it continues to apply its own standards as to what activities can and what activities cannot be carried on by an exempt organization without the loss of its exemption. With the Revenue Service applying one legal standard of exemption under Section 501(c)(6) and the lower federal courts applying another, this Court—which has never decided a case under Section 501(c)(6) or the corresponding provisions in prior acts—should resolve the confusion resulting from these conflicting interpretations of an important question of federal law. Such a resolution by this Court will also be of great value in determining exemption under the similarly worded provisions of Sections 501(c)(3) and 501(c)(7).

The far-reaching practical significance of the legal issues presented by this appeal is demonstrated by the fact that in the year ended June 30, 1962, the district offices of the Revenue Service issued 4,970 determination letters involving exempt organizations and closed another 1,359 such inquiries received from exempt organizations without issuing such a formal letter. Commissioner of Internal Revenue, Annual Report 1962, p. 11. Moreover, reference to the United States Department of Commerce, Directory of National Associations of Businessmen (1961), pages 1 and 4, reveals that in 1961 there were 13,000 national and local trade associations, 5,000 local chambers of commerce and 1,300

[4] According to the Prentice-Hall Federal Tax Service Citator and the Commerce Clearing House, Standard Federal Tax Reporter, an appeal has been taken by the government only in *Fort Worth Club of Fort Worth, Texas* v. *United States*.

local real estate boards in the United States. According to the record before the Court of Claims in this case, some 573 of these real estate boards have some form of board-organized exchange of information which is commonly referred to as multiple listing. Tr., Spatz, p. 301. It is of critical importance in the administration of the income tax laws as applied to this vast number of associations to have a clear cut definition by this Court of the restrictions, if any, intended to be imposed upon their activities by the language of Section 501(c)(6) of the Internal Revenue Code. Many of these associations conduct various activities directed to the improvement of business conditions in their area of operations, which activities are not themselves exempt. The tax exempt status of all of these organizations is cast in doubt by the Revenue Service's interpretation of the requirements for exemption. This is particularly true of the 573 real estate boards with some form of multiple listing as part of their programs, each of which is presently in the posture of seeking a determination contrary to that made by the Court of Claims as to the Evanston-North Shore Board by bringing an action for refund of federal income taxes assessed in some other federal court.

II.

The legal test of exemption adopted by the Court of Claims as applicable under Section 501(c)(6) of the Internal Revenue Code of 1954 resolves an important question of interpretation of the exemption provisions of the internal revenue laws in such a manner as to conflict in principle with the decision of this Court in *Trinidad* v. *Sagrada Orden.*, 263 U.S. 578.

In applying a legal test of exemption which disregards petitioning Board's over-all purpose and concentrates on whether one of its many activities is "an activity warranting

exemption under the statute," R. 30, the Court of Claims applied a legal test which conflicts with that set down in the only decision of this Court interpreting any of the provisions of Section 501 or the corresponding provisions in prior revenue acts.

In *Trinidad* v. *Sagrada Orden*., 263 U. S. 578, this Court affirmed the decision of the Supreme Court of the Philippine Islands sustaining the exemption of a corporation sole organized and operated for religious, benevolent, scientific and educational purposes and which was engaged in missionary work in the Philippines and Asia. The corporation claimed exemption under the provisions of the Revenue Act of 1913 which are comparable to Section 501(c)(3) of the Internal Revenue Code of 1954.[5] In addition to its religious activities, the corporation held stock in private corporations from which it received dividends, loaned money on which it received interest, sold wines, chocolates and other articles for a profit, and owned huge tracts of land which it rented to others for non-exempt uses. The income from these commercial activities totaled somewhat more than the equivalent of $125,000 a year in American currency. This income was devoted to carrying on the corporation's religious, charitable and educational activities. The Collector of Internal Revenue urged in that case the same activities test of exemption applied by the Court of Claims in the decision below, contending that the corporation was not "operated exclusively" for exempt purposes because it is "operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wines, chocolates and other articles."

[5] Sec. II(G)(a) of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166. Sec. II(G)(a) exempted any corporation "organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private shareholder or individual."

This Court, by Mr. Justice Van Devanter, stated that the Collector's legal theory ignored the fact that the income from the properties was devoted to religious and educational purposes and that the limited trading carried on was incidental to these purposes. This Court held as to the income produced from dividends, rental and interest that: "In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

In the *Trinidad* decision, this Court rejected in principle the legal standard that to be exempt all of an organization's substantial activities must also be exempt and ruled instead that exemption depends on whether an organization has an over-all exempt purpose and all of its activities (whether or not exempt in themselves) are directed to that over-all purpose. In its decision holding petitioner not entitled to exemption, the Court of Claims applied a standard of exemption in conflict with the decision of this Court in the *Trinidad* case.

III.

The decision of the Court of Claims in this case creates a conflict among the circuits on the question of the legal test of exemption under Section 501(c)(6) in that the test applied by the Court of Claims is directly contrary to the test of exemption enunciated and applied by the Courts of Appeals for the Fifth, Seventh and Eighth Circuits.

In requiring that all of an exempt organization's activities which create a substantial cash flow or require considerable clerical work must also warrant exemption, the Court of Claims has established a legal standard of exemption in direct conflict to that applied by the Courts of Appeals for the Fifth Circuit in *Texas Mobile Home Ass'n* v.

Commissioner, — F.2d —, 63-2 USTC ¶ 9831, for the Seventh Circuit in *Commissioner* v. *Chicago Graphic Arts Federation*, 128 F.2d 424, and for the Eighth Circuit in *Crooks* v. *Kansas City Hay Dealers' Ass'n*, 37 F.2d 83. In each of these decisions, as well as in a number of District Court decisions,[6] the courts have upheld the exempt status of a business league in spite of the fact that it was engaged in substantial activities (as those terms were used by the Court of Claims) that did not themselves warrant exemption and they have done so because, notwithstanding the fact that the activities themselves were not exempt, they were carried on in furtherance of or incidental and subordinate to the business league's over-all exempt purpose.

In *Texas Mobile Home Ass'n* v. *Commissioner*, — F.2d —, 63-2 USTC ¶ 9831, the Court of Appeals for the Fifth Circuit reversed a decision of the Tax Court that a trade association of mobile home or house trailer dealers had lost its exempt status under Section 501(c)(6) by conducting a trade show from which it received substantial profits, 79 per cent of its net income in 1956 and 40 per cent in 1957. The organization had contended before the Tax Court and before the Court of Appeals that any profits received or services rendered its members through the conduct of the trade show "were incidental to its primary purpose of improving business conditions in the mobile home industry." The Court of Appeals stated that in refusing to hold the organization exempt ". . . the purpose and effect of the Congressional act was entirely overlooked, indeed

[6] For example, *American Fishermen's Tuna Boat Ass'n* v. *Rogan*, 51 F. Supp. 933 (S.D. Cal.); *National Leather & Shoe Finders Ass'n* v. *Commissioner*, 9 T.C. 121; *Milwaukee Ass'n of Commerce* v. *United States*, 72 F. Supp. 310 (E.D. Wis.); *Little Rock Grain Exchange* v. *Thompson*, 93 F. Supp. 571 (E.D. Ark.); *American Institute of Interior Designers* v. *United States*, 208 F. Supp. 201 (N.D. Cal.).

disregarded." The Court then accused the Tax Court of having its "gaze so foreshortened by the view of the publican and the tax gatherer that it tithed mint, anise and cumin, overlooking the weightier things of applicable law . . . ."

In *Commissioner* v. *Chicago Graphic Arts Federation*, 128 F.2d 424, the Court of Appeals for the Seventh Circuit affirmed a decision of the Tax Court that a trade association of printing plant owners and operators had not lost its exempt status by engaging in the operation of a credit information bureau, an employment service, handling sales tax refund claims for the industry, and conducting a co-operative waste paper disposal service—all activities not exempt in themselves. The organization's income from these other activities accounted for 40 per cent and 34 per cent of its total income during the years in suit.[7] The Revenue Service contended that because the organization engaged in these substantial non-exempt activities it was not entitled to exemption. The Court of Appeals rejected this standard and stated the test of exemption to be as follows (p. 426):

> Where the business league has proper purposes without prohibited ones, then, if it operates in conformity to it, it is entitled to exemption. To come within the exemption, however, its activities must be directed to the improvement of business conditions or to the promotion of the general objects of one or more lines of business as distinguished from the performance of particular services for individual persons, but if the services are only incidental or subordinate to the main or principal

[7] The Court of Claims sou[illegible] to distinguish this case on the grounds, *inter alia*, ". . . the relative importance of the nonexempt activities had steadily declined to 17% in 1939. . . ." The suit, however, involved the years 1936 and 1937 for which the figures given above are applicable.

> purposes required by statute, then exemption cannot be denied on the ground that the purpose is to engage in a regular business of a kind ordinarily carried on for profit, . . .

In *Crooks v. Kansas City Hay Dealers' Ass'n*, 37 F.2d 83, the Court of Appeals for the Eighth Circuit affirmed a decision of the District Court that an association of hay and straw brokers was entitled to exemption in spite of considerable non-exempt activities which included weighing, plugging, watching and inspecting cars of hay, all for a fee. The Revenue Service contended that because of its undertaking these activities the association was organized for profit. The Court of Appeals held that these activities and the proceeds from them were merely incidental to the over-all purposes of the association and the association retained its exempt status.

The decision of the Court of Claims in the case at bar establishes a legal test for exemption under Section 501(c)(6) which is in direct conflict with these Court of Appeals decisions, and this Court should, accordingly, review the decision of the Court of Claims to establish the correct legal standard.

IV.

The legal standard for exemption adopted by the Court of Claims in the decision below is directly contrary to the clear Congressional intent on the requirements for exemption under Section 501(c)(6).

Real estate boards as such were not specifically included in the list of organizations exempted by Congress from federal income taxation until the adoption of the Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 103. Congress was prompted to add real estate boards to the expressly ex-

empted organizations, in spite of the fact that they could well be considered "business leagues", by the fact that during the 1920's the Internal Revenue Service had mounted a two-fold attack on their exempt status. The Revenue Service argued, on the one hand, that since the exemption provision of the statute referred only to business leagues, chambers of commerce and boards of trade, under the rule of *expressio unius* real estate boards had not been granted exemption. On the other hand, the Revenue Service contended that since real estate boards were regularly engaged in a number of activities, such as appraising property, furnishing information about available property in a particular area, and selling meals to their members, which were not activities themselves entitled to exemption, they were not entitled to exemption even if they were to be considered business leagues. This latter argument is precisely the one now being urged against petitioner. The hearings held before the House Ways and Means Committee, House Hearings, Revenue Revision, 1927-1928, pp. 202, 233, 235-238, show that the exempt status of real estate boards in Philadelphia, Rochester, Baltimore, Louisville and elsewhere was being attacked under this activities theory. Nathan MacChesney, Esq., who appeared before the Ways and Means Committee on behalf of the National Association of Real Estate Boards to urge the addition of real estate boards to the list of exempt organizations, stated that the Treasury Department "has attempted to collect from the Philadelphia real-estate board a tax against it as a profit-making institution." He then described one of the Philadelphia board's activities which the Treasury had attacked: a means whereby people could obtain information about available property through maps and pictures. After referring to a then recent decision of this Court, which while

not mentioned by name must have been *Trinidad* v. *Sagrada Orden.*, 263 U.S. 578, Mr. MacChesney concluded "it should be fairly apparent that the real-estate boards of the country were not organized for the purpose of rendering a business service for profit."

In view of this testimony before the Ways and Means Committee, it is quite clear that by adding real estate boards to the list of exempt organizations contained in Section 501(c)(6) Congress intended not only to exempt from tax those boards all of whose activities were themselves entitled to exemption, but also boards a part of whose activities did not independently qualify for exemption. If there could be any doubt on this question, it is put to rest by the amendment of the applicable Treasury Regulation which was adopted following the amendment of the statute. Because the Internal Revenue Code has been revised several times since the Regulation was amended, this Regulation has the implied approval of Congress and the force of statutory law. *Automotive Electric Ass'n* v. *Commissioner*, 168 F.2d 366, 367 (C.A. 6). Prior to the amendment adding real estate boards to the list of exempt organizations contained in the predecessor of Section 501(c)(6) of the statute, the Treasury Regulation applicable to business leagues, and hence to real estate boards, added to the Congressional qualifications for exemption the additional requirement that a business league be "... an association of persons having some common business interest, *which limits its activities to work for such common interest and does not engage* in a regular business of a kind ordinarily carried on for profit." (Emphasis supplied.)

Subsequent to the amendment of the statute and in light of the decision of this Court in *Trinidad* v. *Sagrada Orden.*, the Treasury Regulation was amended to define a business

league as ". . . an association of persons having some common business interest, *the purpose of which is to promote such common interest and not to engage* in a regular business of a kind ordinarily carried on for profit." (Emphasis supplied.) This change in the definition contained in the Regulation from "limits its activities" to "the purpose of which" indicates a clear shift from the legal test of exemption espoused by the Revenue Service and applied by the Court of Claims to the test of exemption urged by petitioner in this case.[8]

The Court of Claims' decision, in ignoring the impact on the applicable standard of exemption of the 1928 amendment to the exemption provisions of the statute and the subsequent change in the applicable Treasury Regulation, has established a standard of exemption that is directly contrary to the standard set down by Congress as well as that applied by other federal courts.

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[8] This change from "activities" to "purpose" is carried out throughout the revised Treasury Regulation:

Reg. 69, 1926, Art. 518
A business league is an association of persons having some common business interest, *which limits its activities to work* for such common interest and *does not* engage in a regular business of a kind ordinarily carried on for profit.

. . . .

If it engages in a regular business of a kind ordinarily carried on for profit, the fact that the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not ground for exemption. (Emphasis supplied.)

. . . .

Reg. 74, 1929, Art. 528
A business league is an association of persons having some common business interest, *the purpose of which is to promote* such common interest and *not to* engage in a regular business of a kind ordinarily carried on for profit. . . . Thus its activities should be *directed to* the improvement of business conditions or to the promotion of the general objects of one or more lines of business as distinguished from the performance of particular services for individual persons. *An organization whose purpose is to engage* in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. (Emphasis supplied.)

. . . .

CONCLUSION

For the reasons set out above, it is respectfully requested that this petition for a writ of certiorari be granted.

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APPENDIX A

Internal Revenue Code of 1954:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.

* * *

(c) LIST OF EXEMPT ORGANIZATIONS.—The following organizations are referred to in subsection (a):

* * *

(6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * *

(26 U.S.C. 1958 ed., Sec. 501)

Treasury Regulations on Income Tax (1954 Code):

SEC. 1.501(c)(6)-1. BUSINESS LEAGUES, CHAMBERS OF COMMERCE, REAL ESTATE BOARDS, AND BOARDS OF TRADE.

A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces

only sufficient income to be self-sustaining, is not a business league. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of section 501(c)(6) and is not exempt from tax. Organizations otherwise exempt from tax under this section are taxable upon their unrelated business taxable income. See part II (section 511 and following), subchapter F, chapter 1 of the Code, and the regulations thereunder.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 117-61

(Decided July 12, 1963)

EVANSTON-NORTH SHORE BOARD OF REALTORS
v. THE UNITED STATES

Theodore A. Groenke for plaintiff. *Edward H. McDermott, Richard E. Murphy, Jr.* and *Frank M. Covey, Jr.*, were on the briefs.

George Willi, with whom was *Assistant Attorney General Louis F. Oberdorfer*, for defendant. *Edward S. Smith, Lyle M. Turner* and *Philip R. Miller* were on the brief.

Before WHITAKER, Acting Chief Judge, REED, *Justice (Ret.)*, sitting by designation, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

REED, *Justice (Ret.)*, sitting by designation, delivered the opinion of the court:

Plaintiff brings this action for an income tax refund for the fiscal year ending June 30, 1959. It claims that, as a real estate board, it is exempt from the payment of income taxes under § 501(c)(6) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(6) (1958 ed.), which confers an exemption upon:

"(6) Business leagues, chambers of commerce, *real estate boards*, or boards of trade, not organized for

profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." (Emphasis added.)

The Evanston-North Shore Board of Realtors is an Illinois not-for-profit corporation whose 581 members consist primarily of licensed real estate brokers and salesmen in the Evanston and North Shore areas of suburban Chicago. The purposes of the Board, according to its Articles of Incorporation, are in part to maintain the responsibility of its members in their duty to the public, to enforce fair dealing, to foster fellowship among its members, and to support such governmental regulation as is designed to advance the interests of real property owners. The activities by which the Board strives to fulfill these ends include the operation of a member selection program to screen and educate new applicants for membership, the arbitration of disputes between members, the enforcement of a Code of Ethics promulgated by the National Association of Real Estate Boards, participation in the adoption and enforcement of local zoning ordinances and other municipal regulation of matters relating to real estate, and the support of various campaigns to maintain and improve our cities.

So long as these unquestionably were the primary activities of the Board, plaintiff's right to an exemption under §501(c)(6) was recognized by the Internal Revenue Service. However, in 1953 the Board, as have many other realty boards throughout the country, added to its activities the operation of a "Cooperative Listing Service," commonly termed a "multiple listing system" or "multiple listing service." In 1959, the Internal Revenue authorities issued Revenue Ruling 59-234, 1959-2 Cum Bull. 149, in which it was concluded that a real estate board the primary purpose or activity of which is the operation of a multiple listing

system, is not entitled to exempt status under the statute and the interpretative regulation; plaintiff subsequently was notified that its exemption was to be terminated as of June 30, 1958.

Plaintiff's challenge to the termination of its exemption rests on two grounds. First, it contests the basis of Revenue Ruling 59-234, and argues that a nonprofit corporation operating a multiple listing service as its primary activity is entitled to exemption under §501(c)(6). Alternatively, plaintiff asserts that it should be tax free because the operation of its multiple listing service is not its primary activity but is only incidental to its other primary objectives.

A multiple listing system is a means by which the participating real estate dealers share listings which each has obtained for the sale of realty. Participation in the service operated by the plaintiff is mandatory for all Board members whose primary business is the sale of residential property. The operation of the plaintiff's system is more fully described in our Findings 28-33. It will do for these purposes to point out that when a real estate broker participating in the service enters a contract to act as agent for the sale of property, he forwards certain information regarding the property to the Board office; the Board duplicates this information and distributes it, together with a photograph of the property, to all other participating brokers. Thereafter, a date is arranged on which all brokers may inspect the listed property. If a broker other than the listing broker effects the sale of the property, the commission is divided between him and the listing broker.

The listing service is financed in the following manner. In addition to a fixed monthly fee of $7 per member brokerage office, a listing broker is charged $10 each time he lists a piece of property. If he effects the sale himself, he is charged an additional $2; if a sale is effected cooperatively

through another member broker, the listing broker pays the same additional $2, and the selling broker is also charged a $12 fee. The Board does not, however, segregate these funds from those which it obtains from other sources.

Turning to the applicable provisions of law, section 501(c)(6) is set out above. The regulation to the statute further provides that in order for an organization to qualify for an exemption, its activities must be "directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons," and it must not "engage in a regular business of a kind ordinarily carried on for profit."[1] This regulation was first adopted

[1] Treas. Reg. 1.501(c)(6)-1:

Business leagues, chambers of commerce, real estate boards, and boards of trade. A business league is an association of persons having some common business interest, the purpose of which is to promote such common business interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of section 501(c)(6) and is not exempt from tax. . . ."

There is no suggestion that these standards are not equally applicable to a real estate board. Indeed, the legislative history to the 1928 act, in which "real-estate boards" was added to the statute, suggests that the same standards were intended to apply to real estate boards as to the other organizations covered by the exemption provision. See Hearings before House Committee on Ways and Means on Revenue Revision 1927-28, Interim, 69th-70th Congresses, 235-238.

in 1929, Treas. Reg. 74, Art. 528, shortly after real estate boards had been added to the coverage of the statute, 45 Stat. 813, and the regulation has remained unchanged through repeated statutory reenactments. As both parties urge, the regulation must now be treated as having the force of law: *Automotive Electric Assn.* v. *Commissioner*, 168 F. 2d 366, 367 (C.A. 6, 1948); *Apartment Operations Assn.* v. *Commissioner*, 136 F. 2d 435 (C.A. 9, 1943); see *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938).

We may concede to the plaintiff that the operation of a multiple listing system is not a business which is normally carried on for profit. The Government argues to the contrary based on the fact that there are more than 100 multiple listing systems in the country which are organized as separate entities. But it does not follow that such organizations are operated for a profit. To the contrary, so far as appears, all of the independent systems are affiliated with and controlled by local real estate boards; none are privately owned corporations organized for profit. Plaintiff's right to an exemption cannot be defeated on this ground. Compare *Oregon Casualty Assn.* v. *Commissioner*, 37 B.T.A. 340 (1938), with *Retailers Credit Assn.* v. *Commissioner*, 90 F. 2d 47 (C.A. 9, 1937).

Nonetheless, if the multiple listing service is operated primarily for individual members as a convenience and economy in the conduct of their respective businesses, rather than for the improvement of business conditions within the real estate business generally, as was determined in Revenue Ruling 59-234, the operation of the service is not an activity warranting an exemption under the statute.

> "The numerous subdivisions of . . . [the predecessor to § 501] and the corresponding provisions in the earlier acts, specify organizations which, in the great majority

> of instances, are evidently granted exemption because of the benefit to be derived by the public from their activities. Cf. Trinidad v. Sagrada Orden, 263 U.S. 578, 581, 44 S. Ct. 204, 68 L. Ed. 458. There is reason why these should be favored, but none is apparent for exempting an association which merely serves each member as a convenience or economy in his business." Produce Exchange Stock Clearing Assn. v. Helvering, 71 F.2d 142, 143 (C.A. 2, 1934).

See *Apartment Operations Assn.* v. *Commissioner*, 136 F.2d 435, 436 (C.A. 9, 1943); *Growers Cold Storage Co.* v. *Commissioner*, 17 B.T.A. 1279, 1283 (1929).

To determine whether a multiple listing service is operated primarily for the benefit of individual realtors or for the benefit of real estate business generally is not without difficulty, since the interests of both and of the public as well are served by a system which facilitates the exchange of real property. Indeed, Revenue Ruling 59-234 is based upon the assumption that the purposes of a multiple listing service are:

> "(a) to assist members of the board in rendering better service to the public by creating a broader and more active market for real estate; (b) to stimulate and facilitate the transaction of business between members of the board through cooperation and exchange of exclusive listings; (c) to provide a medium through which real estate may be merchandised more efficiently and expeditiously to the advantage of both buyer and seller; and (d) to encourage realtors to uphold high standards of business practice and to further educate them in adhering to the principles of the Realtors' Code of Ethics."

And a publication of the National Association of Real Estate Boards states simply that a multiple listing system is "a medium through which real estate may be merchandised efficiently and expeditiously to the advantage of the

buyer and the seller and which will produce a greater profit to the Realtor." Moss, Multiple Listing Practice and Procedures 9 (Secretaries, Council, National Association of Real Estate Boards, 1950).

Fortunately for the national welfare, though perhaps unfortunately for tax law, this is not an uncommon situation. The activities of many trade groups are of benefit to both the public and the trade in general, and to individual members of the trade. As the Tax Court noted in *National Leather & Shoe Finders Assn.* v. *Commissioner*, 9 T.C. 121, 126 (1947), "it can hardly be supposed that individuals would often join organizations without the expectation of receiving some personal benefits therefrom." Hence, the courts have often been called upon to determine whether the primary purpose and effect of an organization's activities is to benefit the group or the individual, and upon such a determination has hinged the fate of the exemption. Compare *Automotive Electric Assn.* v. *Commissioner*, 168 F.2d 366 (C.A. 6, 1948), with *National Leather & Shoe Finders Assn.* v. *Commissioner*, 9 T.C. 121 (1947).

In considering the facts of this case, we find several factors which require the conclusion that plaintiff's multiple listing system operates most immediately to the benefit of the individual participating realtors. First, and most important, is the fact that the fees charged for the listing service are in approximate proportion to the benefits received by each realtor. A broker pays a fee for each piece of property which he lists, which listing is circulated to all other listing brokers, any of whom may sell the property and thus earn a commission for the listing broker. A like fee is paid by any other broker who is able to sell the property, and who thereby earns a commission on the sale. When each member contributes in proportion to what he receives, it is a strong indication that the benefits received

are not, as plaintiff contends they are, "inherently group benefits." See *National Chiropractic Assn.* v. *Birmingham*, 96 F. Supp. 874 (N.D. Iowa, 1951); *General Contractors' Assn.* v. *United States*, 202 F.2d 633 (C.A. 7, 1953); *Jockey Club* v. *United States*, 133 Ct. Cl. 787, 137 F. Supp. 419, *cert. denied*, 352 U.S. 834 (1956); *Credit Managers Assn.* v. *Commissioner*, 148 F.2d 41 (C.A. 9, 1945); *Durham Merchant's Assn.* v. *United States*, 34 F. Supp. 71 (M.D.N.C., 1940); *Fort Worth Grain & Cotton Exchange* v. *Commissioner*, 27 B.T.A. 983 (1933); *Growers Cold Storage Co.* v. *Commissioner*, 17 B.T.A. 1279 (1929).

Second, there is also the consideration, upon which the Government places great stress, that participation in the multiple listing service is limited to members of the Board. This fact does provide some indication that the service is not designed to serve the real estate business generally, *Park West-Riverside Associates* v. *Commissioner*, 1 T.C. B.T.A. Memo. Dec. ¶ 39,251 (1939), aff'd, 110 F. 2d 1022 (C.A. 2, 1940), although it may be that the limitation is best explained by the necessities of administering and enforcing the rules and procedures of the listing service. Moreover, to place too great reliance on this facter would confront taxpayers with a real dilemma. For if the service were made available to nonmembers of the Board, the inference would be available that the Board was seeking to earn profits from nonmembers which would inure indirectly to the benefit of its members, see *American Automobile Assn.* v. *Commissioner*, 19 T.C. 1146 (1953); *Texas Mobile Home Assn.* v. *Commissioner*, P.H. Memo T.C. ¶ 62,095 (1962), another ground upon which exemption could be denied.

Third, we take note of the manner in which the listing service has been regarded by the National Association of Real Estate Boards. In a brief filed with the Internal

Revenue Service in October, 1956, by Mr. George Ellis, the Comptroller and Consultant for the National Association, speaking in part on plaintiff's behalf, it was conceded that "[t]he so-called multiple listing services operated outside and independent of a real estate board, are in fact, nothing more than a cooperative sales department of a purely business operation." See Finding 16. In a 1951 issue of the "Multiple Listing Digestaire" (see Finding 35), the National Chairman of Multiple Listing for the Secretaries Council reported:

> "Never before in the history of selling has a selling service of this magnitude been offered to the property owner and from the experience of realty boards throughout the country which have used this same service. A great proportion of listings filed with the organization are sold. It is estimated that the average individual real estate broker cannot expect to sell more than 1% of the listings he receives; whereas this cooperative service has consistently been instrumental in selling 30–45% of the listings filed." Multiple Listing Digestaire 1 (3d Quarter, 1951).

An article in a later issue pointed out that multiple listing is not a perfect service, but "should be regarded as just one of the sales tools" in the realtor's office. Multiple Listing Digestaire 9 (Sept., 1952). Like additional statements could be extracted from the pages of the Digestaire, 19 issues of which were introduced in evidence in this case. Plaintiff of course is not bound by any such statements. Nevertheless, evidence that the industry itself regards the listing service as a "sales tool" at the disposal of the individual realtors is not without significance.

Finally, there is a particularly compelling analogy between the operation of a multiple listing service and of a stock or commodity exchange. Both are means of bringing

buyers and sellers together to facilitate the sale of property. Both are supported by the brokers who earn commissions by arranging sales of the property. Both provide a genuine benefit to persons desirous of buying and selling property and to the brokers who deal in such property.[2] Since 1925 the regulations have expressly denied stock exchanges exempt status. T.D. 3746, IV—2 Cum. Bull. 77; see Treas. Reg. 1.501(c)(6)-1. And see *Produce Exchange Stock Clearing Assn.* v. *Helvering*, 71 F. 2d 142 (C.A. 2, 1934). We see no distinction between the exchange and the multiple listing service which would explain why the balance struck in the case of the former, in favor of taxability, should not govern in the case of the latter.

Hence, we sustain the determination of the Revenue Service that the operation of plaintiff's multiple listing system cannot be regarded as directed to the improvement of business conditions in the real estate market within the meaning of the regulations, but rather constitutes the performance

[2] "This is why Exchanges exist, not only Stock Exchanges, but market-places of all kinds: Buyers seek the largest market they can get in order to obtain the lowest prices; sellers, in order to obtain the highest prices; and so it was learned long ago that economy of time and labor, as well as a theoretically perfect market, could be best secured by an organization under one roof of as many dealers in a commodity as could be found. Bear in mind that this result, moreover, is best accomplished when the organization is so controlled by rigid rules of business morality as to insure to every one who does business there, great and small, rich and poor, an absolutely square deal. In such a market every purchase is made with the most thorough acquaintance with the conditions involved. Each dealer, each broker, each speculator, strives to obtain the best knowledge of the supply and demand, and the earliest news that may affect it, and each buyer or seller has an equal and a fair opportunity to profit by the resultant effect on the market of all these various agencies. The larger the body of brokers and traders, then, the more accurate the standards of value thus created. It is a pity you could not have bought your piano under such conditions." Van Antwerp, The Stock Exchange from Within 6–7 (1913).

of a particular service for brokers participating in the service.

Nonetheless, it is true that an organization whose principal purpose and activity is such as to justify exemption does not lose its exempt status by engaging in incidental activity which standing alone would be subject to taxation. *Retailers Credit Assn* v. *Commissioner*, 90 F. 2d 47 (C.A. 9, 1937); *Associated Industries of Cleveland* v. *Commissioner*, 7 T.C. 1449, 1467 (1946); cf *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U.S. 578 (1924). Plaintiff's second contention is that it is entitled to an exemption for this reason —because the operation of its multiple listing system is only incidental to its other activities, which would otherwise entitle it to an exemption. However, the facts of this case do not permit such a conclusion.

In 1948 the plaintiff had one employee who was its executive secretary. At the time of the trial of this action, December 5, 1961, the plaintiff had five full-time employees and one part-time employee. It is a reasonable inference from the entire record that the increase in the number of employees was due in large measure to its operation of the multiple listing service. Of the Board's $94,652.77 gross income for the fiscal year ending in June, 1956,[3] $57,381.00, or 61%, was derived from the operation of the multiple listing service. The Board's data does not permit precise allocation of the costs attributable to its multiple listing service and to its other activities; however, of total expenses of $76,654.70, $32,591.50 is directly allocable to the listing service, as is a substantial portion of $16,339.11 salaries expense. It would be reasonable to estimate that the listing service produced from $10,000 to $15,000 profit for the year, or from 27% to 40% of the Board's gross income from all

[3] See Findings 14, 38.

sources other than the multiple listing service.[4] These figures would seem more nearly to indicate that the listing service is now the dominant, rather than an incidental, activity of the Evanston-North Shore Board.

Plaintiff asks that we disregard this data, however, and look instead to the overriding "purpose" of the Board to determine the significance of the multiple listing system in its over-all structure. Admittedly, there is considerable evidence in the record that the Board and its predecessor were formed for the purpose of eliminating abusive and unethical practices among local realtors and to promote what was considered to be healthy cooperation between the brokers. It is also true that in determining the relative importance of the activities of an organization so as to pass upon the application of the exemption statute, courts have often worded their analysis in terms of the purpose, or *raison d'etre*, of the organization. E.g., *Associated Industries of Cleveland* v. *Commissioner*, 7 T.C. 1449, 1467, 1468 (1946); *National Leather & Shoe Finders Assn.* v. *Commissioner*, 9 T.C. 121, 127 (1947). But these cases do not support the contention that a group's purpose can be disassociated from its activities. To the contrary, in *Scripture Press Foundation* v. *United States*, 152 Ct. Cl. ——, 285 F. 2d 800 (1961), *cert. denied*, 368 U.S. 985 (1962), a religious publishing house claimed exemption under a related statute applying to organizations devoted to religious purposes;[5] the organization

[4] See Finding 14. The Board's gross income from all sources other than the listing service was $37,271.17. If the profit from the listing service was $10,000, then the percentage was 27%; if $15,000.00, then 40%.

[5] Internal Revenue Code of 1939 § 101(6), 26 U.S.C. § 101(6) (1952 ed.); now Internal Revenue Code of 1954 § 501(c)(3), 26 U.S.C. § 501(c)(3) (1958 ed.). It is true that this provision probably imposes a more rigorous standard than § 501(c)(6), since it

contended that its fundamental objective was to stimulate the growth of Sunday schools in the United States, primarily by rendering free instructional services through its Instructional Department, rather than to earn profits. In rejecting the significance of this fact, Chief Judge Jones asserted the following for this court:

> "We think that plaintiff's assertion that its instructional activities are more important to plaintiff than its selling activities is entirely sincere. The evidence in this case, as is amply borne out by the findings of the trial commissioner, shows that throughout its history Scripture Press has been led by people of devout and intense religious conviction. However, the intensity of the religious convictions of the plaintiff's members and officers cannot operate to exempt them from the tax law if the activities of the plaintiff cannot in themselves justify such an exemption. Piety is no defense to the assessments of the tax collector.
>
> * * * * *
>
> We think it is fair in making a determination as to what was the most important aspect of plaintiff's work to compare how much plaintiff accumulated as a result of its sales of religious literature and how much it expended for instructional activities." 152 Ct. Cl. at ——, 285 F. 2d at 804.

The court went on to hold that "the enormity of the contrast between what plaintiff has accumulated from sales each year and what it has expended for its educational programs reveals that the sale of religious literature is its primary activity and that its instructional phase is incidental thereto." In accord, see *American Institute for Economic Research* v. *United States*, —— Ct. Cl. ——, 302 F. 2d 934,

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requires that the organization be operated "*exclusively* for religious . . . purposes;" however, in holding that the activities of the organization rather than the convictions of its members must control, the court was referring only to the type of evidence that was relevant, and as to this the decision is apposite here.

cert. denied, 372 U.S. 975 (1962); *Consumer-Farmer Milk Cooperative* v. *Commissioner*, 186 F. 2d 68 (C.A. 2, 1950), *cert. denied*, 341 U.S. 931 (1951); *Durham Merchant's Assn.* v. *United States*, 34 F. Supp. 71 (M.D. N.C., 1940); *Fort Worth Grain & Cotton Exchange* v. *Commissioner*, 27 B.T.A. 983 (1933).

In seeking to minimize the importance of such financial data, plaintiff points out that in *Milwaukee Assn. of Commerce* v. *United States*, 72 F. Supp. 310 (E.D. Wis., 1947), an association which earned profits of $20,000 over a three year period from nonexempt activities was held exempt under the predecessor to § 501(c)(6). Plaintiff fails to point out, however, that the association also had other revenues of $337,734.19 for this same period. With better justification, plaintiff places reliance on *Commissioner* v. *Chicago Graphic Arts Fed.*, 128 F. 2d 424 (C.A. 7, 1942), where for the tax years 1936 and 1937, the federation had received 40% and 34% of its revenues from nonexempt activities, but was nonetheless held entitled to exemption. However, in that case the relative importance of the nonexempt activities had steadily declined to 17% in 1939; more important, the court, though holding the nonexempt activities "incidental or subordinate to * * * [the federation's] main or principal purpose," quoted from *Northwestern Municipal Assn.* v. *United States*, 99 F. 2d 460, 463 (C.A. 8, 1938), to the effect that in applying the exemption statute, "the court often considers which of its *activities represents the main purpose* of its operations and . . . such are incidental thereto." 128 F. 2d at 427. (Emphasis added.)

We do not say that financial data of the type here present is the only relevant criterion of the importance of one of an organization's many activities. But we do hold that the relative contribution to plaintiff's receipts and expenditures of its listing service, and the amount of personnel which the

service requires, are sufficiently substantial that the listing service cannot be regarded as an incidental activity of the Board.

It follows from what we have said that the plaintiff is entitled to no refund; its complaint is therefore dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff, Evanston-North Shore Board of Realtors, is a not-for-profit corporation organized under the laws of the State of Illinois on January 27, 1936, as the successor of the Evanston Real Estate Board, an Illinois corporation organized on January 15, 1919, under the not-for-profit provisions of the Illinois Corporation Act of 1872.

2. According to its Articles of Incorporation, the plaintiff was formed in 1936, for the same purposes as its immediate predecessor, the Evanston Real Estate Board. Those purposes were:

(a) To establish and standardize the business of real estate brokerage, so that it shall obtain and hold the confidence and respect of both owners and purchasers;

(b) To maintain the dignity and responsibility of its members in their duty to the public;

(c) To cultivate and enforce fair dealing and foster good fellowship among its members in their business of buying, selling, renting, and managing real estate, and loaning money thereon;

(d) To provide an organized center of effort for adequate and economic civic development;

(e) To procure just and even taxation;

(f) To promote such a system of law and administration as shall protect our citizens, encourage industry,

and attract the desirable population to which our condition entitles us, to especially guard and advance the interests of real estate ownership and leaseholds; and

(g) To devise, advocate, and support legislation calculated to improve our cities.

3. Plaintiff's membership is limited to real estate brokers and salesmen licensed as such by the State of Illinois and to certain other persons such as contractors, appraisers, mortgage bankers and others with a special interest in the business of real estate brokerage who are admitted as special members of the Board with a limited right to participate in its activities.

4. Real estate brokers and salesmen who have been licensed by the State of Illinois and who operate within the area of the jurisdiction of plaintiff are admitted to membership in the Board either as active or as active associate members. To be an active member of the Board, an individual must maintain an office within plaintiff's territorial jurisdiction, separate from his home and in a nonresidential area or other area where local zoning laws permit the operation of such a business, and must have been actively engaged in the real estate business in the North Shore suburbs of Chicago, Illinois, for a period of not less than 6 months. Only one member of any one firm or corporation is eligible for active membership in the Board. Other members and employees of such a firm who are actively engaged in the real estate business are admitted to the Board as active associate members.

5. As of June 30, 1959, there were 581 active and active associate members in the Board, of whom approximately 100 were active members.

6. During the year in suit, the initiation fee for the plaintiff's active members was $1,000 and for active asso-

ciate members, $100. Annual dues for active members were $85 and for active associate members, $20, which sums included the annual dues payable by the plaintiff's members to both the Illinois and National Associations of Real Estate Boards (sometimes hereafter referred to as NAREB).

7. The term "realtor" is the registered trademark of the National Association of Real Estate Boards. By virtue of their membership in the National Association and their pledge to abide by that Association's Code of Ethics, the plaintiff's active members are entitled to describe themselves as realtors.

8. The plaintiff, as a real estate board, is a member of the Illinois Association of Real Estate Boards and the National Association of Real Estate Boards. By virtue of their membership in the plaintiff Board, the plaintiff's members are also members of the National Association of Real Estate Boards.

9. Through its member selection program the Board has attempted to improve the quality and training of real estate salesmen and brokers who become members of the Board. This program, which gradually developed over the years, was initiated in about 1938. It presently consists of screening, educating, testing and observing new applicants before they are admitted to membership. Applicants' references, and if salesmen, their employers, and if brokers, their financial statements, are checked. If these investigations prove satisfactory, applicants are admitted to a probationary status for a period of 6 months. During this period applicants must attend a 6-week educational program consisting of lectures by Board members concerning various aspects of the conduct of a real estate business. At the conclusion of the educational program, applicants must pass a written examination with a score of 75 percent or better. If during the 6-month probationary period their conduct has been in

keeping with plaintiff's standards, and they make a passing grade on the written examination, the applicants are admitted to membership in the Board.

10. The plaintiff, as part of its program of education to its members, began in 1957 to make provision for payment of tuition at local universities. The record does not show the amount which was actually spent for tuition in any year. The reserve for this purpose for the fiscal year ended June 30th for the years 1958-1961, is as follows:

1958	$ 1,540.00
1959	5,151.89
1960	6,839.44
1961	10,385.81

There is some indication that some of the tuition paid has been forfeited.

11. On December 20, 1941, the plaintiff, then known as the Evanston-North Shore Real Estate Board, applied to the Commissioner of Internal Revenue for a ruling to the effect that it was a "real estate board" within the meaning of Section 101(7) of the Internal Revenue Code of 1939. For the period January 1, 1940, to May 31, 1940, the plaintiff's receipts and expenses totaled $2,794.28 and $815.56, respectively. For the period June 1, 1940, to May 31, 1941, receipts and expenses totaled $2,833.10 and $2,515.22, respectively. The above information as to source of its revenue and its expenses was furnished to the Commissioner with the plaintiff's application. By letter of January 13, 1942, the Commissioner of Internal Revenue advised the plaintiff that, based on the information submitted by the plaintiff, it qualified for exemption under Section 101(7).

12. In April 1951, the plaintiff was requested by the Internal Revenue Service to fill out an application for exemption "* * * designed to develop the facts necessary to deter-

mine whether you qualify for exemption from Federal income tax * * *." The plaintiff, through counsel, on May 17, 1951, forwarded an executed application to the Commissioner of Internal Revenue. The source of all income of plaintiff was therein stated to be derived from "dues from members." The purposes for which such funds were stated to be expended were "office expense; salaries of office personnel, postage, printing information bulletins for members." No information was requested or given concerning the amount of its income or expenses. On June 8, 1951, the plaintiff was advised by the Deputy Commissioner that, upon the evidence presented, it was "exempt from Federal income tax under the provisions of section 101(7) of the Internal Revenue Code, and corresponding provisions of prior revenue acts."

13. On May 13, 1957, the District Director of Internal Revenue for the District of Illinois, wrote to the plaintiff requesting that it submit an executed application for exemption (Form 1024), completely filled out, together with the following:

1. Classified statement of receipts and expenditures for fiscal year ended June 30, 1956.

2. Statement of assets and liabilities as of June 30, 1956.

3. Copy of Articles of Incorporation if incorporated.

4. Copy of Constitution and By-Laws complete with Amendments.

14. On or about June 19, 1957, the plaintiff submitted its exemption application on Form 1024, which is in evidence as plaintiff's exhibit 21A through 21AA and which is hereby incorporated by reference as a part of this finding. In the application, the plaintiff briefly stated the purpose for which the organization was formed to be "operates a real estate

board." The activities in which the organization had been engaged during its last 2 years of operation were stated to be as follows:

Valuation of real estate
Arbitration
Publish monthly bulletin
Listing services
Furnish information to members
Conduct educational courses for applicants and members

Attached to the application were a balance sheet showing assets of some $66,000, and statements of income and expenses, as follows:

STATEMENT OF INCOME

Year Ended June 30, 1956

Income:		
Initiation fees		$ 1,500.00
Transfer fees		450.00
Dues—		
Active members	$5,850.00	
Active Class B members	980.00	
Active associate members	7,980.00	
Associate members	350.00	
		15,160.00
Income from applicants		1,462.50
Members' meetings, dinners, etc.		10,982.25
Multi-list service		57,381.60
Bulletin		3,900.00
Supplies		1,968.45
Appraisals		800.00
Arbitration		139.88
Mailing service		62.62
Interest		807.37
Sundry		38.10
		$94,652.77

STATEMENT OF EXPENSES.

Year Ended June 30, 1956

Appraisals	$ 544.76
Advertising and public relations	758.35
Audit and accounting services	994.00
Amortization of leasehold improvements	291.87
Bad debts	31.25
Bulletin	1,904.25
Catalogue	1,184.39
Convention and travel	1682.73
Depreciation	684.64
Directors' meetings	37.00
Dues and subscriptions	89.00
Heat	307.55
Insurance	188.51
Legal services	150.00
Light, gas, and water	246.23
Members' meetings, dinners, etc.	10,714.85
Multi-list reproduction costs	25,617.63
Multi-list postage and supplies	6,973.87
Office salaries	16,339.11
Office maintenance	855.17
Postage	441.72
Printing	240.68
Rent	1,200.00
Repairs—equipment	291.41
Stationery and office supplies	819.43
Supplies	1,374.84
Taxes—federal insurance contributions	283.17
Taxes—unemployment insurance	243.13
Telephone	1,358.33
Loss on retirements	54.24
Sundry	752.59
Total Expenses	$76,654.70

15. By a letter of December 5, 1957, Mr. R. C. Dunlap, Exempt Organizations Branch, Internal Revenue Service, advised the plaintiff that on the basis of the information

then before it, the Service was considering the revocation of its income tax exemption in view of the fact that, according to its financial statements, one of the plaintiff's principal activities was the operation of a multiple listing service. Mr. Dunlap advised, however, that before the Service would take final action, it would afford the plaintiff a conference and the opportunity to submit such additional information as it desired. By letters dated December 13, 1957, and April 28, 1959, the plaintiff requested conferences and advised the Service that it would be represented in this matter by Mr. George P. Ellis, consultant and comptroller of the National Association of Real Estate Boards. Such conferences were held.

16. By a letter of June 10, 1960, the Commissioner of Internal Revenue advised the plaintiff that its exempt status was terminated effective on June 30, 1958, the end of plaintiff's 1958 fiscal year. The ground on which the Commissioner revoked his prior ruling was stated in a ruling letter issued by the Commissioner on June 10, 1960, which reads in part as follows:

> By letter dated December 5, 1957, you were advised that we proposed to revoke our above exemption rulings because of a conclusion that your primary activity is the operation of a multiple listing system, which activity results in the performance of particular services for individual persons and is a business of a kind ordinarily carried on for profit. As you have since been apprised, such conclusion reflects the Service position set forth in Revenue Ruling 59-234, Internal Revenue Bulletin 1959-28, 11, which reads, in part, as follows:
>
> "* * * It is apparent that the multiple listing system as operated by real estate boards is inherently designed for the rendering of particular services for individual members as a convenience and economy in the conduct of their respective businesses. Therefore, the instant

organization, instead of primarily engaging in activities for the improvement of business conditions within the real estate business generally, is performing particular services for its members through the maintenance and operation of its multiple listing system by providing them with listings of properties for sale, which serve them as a convenience and economy in the conduct of their businesses. It is further concluded that the operation of a real estate multiple listing service constitutes a business of a kind ordinarily carried on for profit.

"Accordingly, it is held, where the primary purpose or activity of a real-estate board is the operation of a multiple listing system, the real estate board is not entitled to exemption from Federal income tax as an organization described in section 501(c)(6) of the Code."

The ruling letter also contained a detailed statement setting forth the reasons why the Commissioner had determined that a multiple listing service resulted in the performance of particular services for individual persons. This statement was, in part, as follows:

With reference to the question of whether the multiple listing system results in the performance of particular services for individual persons, the National Association of Real Estate Boards, as quoted above, has described the system as "a medium through which real estate may be merchandised efficiently" and as a "tremendous merchandising method." Further, listings are considered a "stock in trade." It is also pertinent to note that although you contend that the real estate business and the community as a whole benefit therefrom, the systems are supported by payments of a portion of the income which specific realtors derive from the existence of the system. We hold, therefore, that the principal purpose of the system is to furnish salable property to those realtors who participate in the program, which purpose is clearly aimed at the benefit of the participants in their individual capacities

rather than the quasi-public, semi-civic benefit of the business community as a whole in the manner contemplated by the applicable Income Tax Regulations.

In connection with the question whether the operation of a multiple listing system is a business of a kind ordinarily carried on for profit, it is material to note that we have consistently so held in considering the income tax status of organizations which engaged in no other activities. In commenting upon such Service policy, in a brief dated October 30, 1956, filed by Mr. George P. Ellis, C.P.A., Comptroller and Consultant, National Association of Real Estate Boards, the following statement was made: . . .

"The so-called Multiple Listing Services operated outside and independent of a real estate board, are in fact, nothing more than a cooperative sales department of a purely business operation. They do not have an exempt objective. * * * "

The only material difference in the operation of the multiple listing services to which Mr. Ellis referred and those to which Revenue Ruling 59-234 refers lies in the fact that in one instance they are separately operated, while in the other the service is conducted by a real-estate board. We do not consider such difference sufficient to justify a distinction between the two types of multiple listing systems.

17. After the ruling on June 10, 1960, that plaintiff did not qualify for exemption under Section 501(c)(6) of the Internal Revenue Code of 1954, the District Director of Internal Revenue at Chicago, Illinois, acting on behalf of defendant, proposed a deficiency in Federal income taxes against plaintiff for the fiscal year ended June 30, 1959, in the amount of $3,510.89. On February 28, 1961, plaintiff duly paid Federal income taxes in the amount of $3,510.89, for the amount of the deficiency proposed by the Director for this fiscal year, together with interest in the amount of $324.76.

18. On March 13, 1961, within 2 years of the date of payment of said tax, plaintiff filed with the District Director of Internal Revenue at Chicago, Illinois, in accordance with applicable rules and regulations, a timely claim for refund (Form 843) requesting a refund of taxes and interest paid in the amount of $3,835.65 on the ground that it was exempt under the provision of Section 501(c)(6) of the Internal Revenue Code of 1954, and that the revocation of the June 8, 1951, ruling as to its exempt status was erroneous. On March 23, 1961, the District Director of Internal Revenue at Chicago, Illinois, acting on behalf of defendant, gave plaintiff notice, by a "certified mail" letter, of his disallowance of the aforesaid refund claim.

19. On March 29, 1961, within 2 years of the Commissioner's formal disallowance of its refund claim, the plaintiff filed this action.

20. The Evanston-North Shore Board of Realtors is, and always has been, the sole and absolute owner of the claim presented in this action and has never made any transfer or assignment of such claim or any part thereof. No action on this claim has been taken before the Congress of the United States or before any of the departments of the Government other than action by the Treasury Department preceding this suit and set forth above. No other suit or process by plaintiff or any assignee is pending in any other court on this claim.

21. The bulk of the plaintiff's various activities is conducted under the auspices and direction of the several standing committees established under its By-Laws. During the year in suit such committees were: Arbitration, Ethics, Attendance, Brokerage, Budget and Finance, By-Laws, Education, Legislation and Taxation, Membership, Mortgage, Program, Realtor and Advertising, Renting and Manage-

ment, Sports, Valuation, Women's Affairs, and Zoning-Planning. In addition, other committees are set up for particular purposes—such committees as Morale and Transportation. The plaintiff also has an Insurance Committee, the purpose of which is to study group health insurance plans for its members and pension plan coverage for its employees.

22. As a condition of their membership, all members of the plaintiff Board agree to submit any commission disputes that arise among themselves to binding arbitration by the Arbitration Committee. The purpose of this By-Law provision is to insure that such controversies do not create adverse public relations for the plaintiff or its members. The Arbitration Committee is concerned solely with problems of commission disputes.

23. The Ethics Committee deals only with enforcement of the Code of Ethics promulgated by the National Association of Real Estate Boards, which have as their principal objective the fostering of the practice of fair dealing by real estate brokers and salesmen with their principals and with each other. Matters come before this committee when a complaint is lodged by a member of the public or by a Board member, or on the committee's own initiative. Thereupon a hearing is held and a decision issued by the committee which, with the approval of the plaintiff's Board of Directors, is empowered to fine, suspend, or expel a Board member.

24. Plaintiff's Zoning and Planning Committee is made up of 1 member from each of the 18 communities within the Board's jurisdiction. Each member is charged with keeping in contact with the municipal government in his specific community on all matters relating to real estate. The com-

mittee maintains a library of zoning ordinances and publicizes all changes in those ordinances. The committee also offers its services to local governments within the area of its jurisdiction and has, upon request, in numerous instances, assisted municipalities in drafting new zoning ordinances or changes in existing ordinances, including a recently adopted new zoning law of the city of Evanston, Illinois. The Board, through its individual members, also aids the enforcement of building and zoning regulations by notifying local building commissioners of zoning violations which come to their attention in the course of buying, selling, and showing properties.

25. Through a project called "Build America Better," which was sponsored by the National Association of Real Estate Boards, plaintiff has promoted and publicized the need for urban rehabilitation and renewal. To implement this project, its members have shown films and have lectured to clubs and the public on the necessity for urban renewal, and have taken pictures of cleanliness violations and the like and presented them to the building and health authorities of cities and towns within the Board's jurisdiction with a request that action be taken to remedy them. As part of this program, plaintiff and its members were successful in securing incorporation in the new zoning ordinance of the city of Evanston, Illinois, of requirements for tuckpointing, painting, rewiring, and cleanup.

26. Through a Transportation Committee, plaintiff has worked to develop transportation facilities in the area of its jurisdiction and has worked with other civic groups in opposition to abandonment of a local interurban railway. Through a Highway Beautification Committee, plaintiff has worked with various garden clubs for the beautification of roads and highways within the area of its jurisdiction.

27. Other activities of the Board include social events and activities carried on for the purpose of promoting attendance at Board meetings and in stimulating interest on the part of Board members in the affairs of the Board. These activities are carried on through a Sports Committee and an Attendance and Reception Committee.

28. Clearly the most important committee of the plaintiff was its Brokerage Committee. In its 1959 official register, the plaintiff describes the function of its Brokerage Committee as follows:

> This committee's duties are also well defined in the By-laws. The Cooperative Listing Service is under its control, as well as the formulation and amendment of rules and regulations of brokerage practices, the development of listing forms and any other tools which will help us in our business.

29. The Brokerage Committee is charged with the duty of formulating rules and regulations for the operation of the cooperative listing service, also referred to in the record as multiple listing service. This committee consists of 11 members of whom 5 are active members. It provides the supervision over the mechanical details of the listing service as well as insuring compliance with its rules and regulations by the plaintiff's members in its operation.

30. The multiple listing service, as operated by the plaintiff, has as its foundation the sharing among its active members (brokers) the listings of other active members. The operation under this service is mandatory on all active and active associate members (salesmen) of the Board except those whose application for exemption is recommended by the Brokerage Committee and is approved by the Board of Directors. Exemption is granted only to those members

whose primary business is not the sale of residential property.

31. Article XIII of the 1959 By-Laws of the plaintiff provides, in part, as follows:

ARTICLE XIII

Co-operative Listing Service

Section 1.

The Co-operative Listing Service of the Evanston-North Shore Board of Realtors is hereby made a part of the By-Laws of said Board and all regulations set up for the operation of said Co-operative Listing Service shall be subject to all of the Articles of the By-Laws of the Evanston-North Shore Board of Realtors.

Section 2. Rules and Regulations.

A—Purpose

The Co-operative Listing Service operates and functions by authority of the Articles of Incorporation and the Constitution and By-Laws of the Evanston-North Shore Board of Realtors.

1) Every rule of co-operative listing is designated to expedite sale of real estate with due regard for the rights of the listing office, the selling office and the public. This principle underlines every rule, decision or conduct.

2) Any effort or act which withholds from the other members any of the rights or benefits is a violation of the spirit of co-operative listing service.

* * * * *

E—Members Exemptions from the Service

The Co-operative Listing Service shall be mandatory on all Active and Active-Associate members of the

Board except those whose application for exemption from the Service is recommended by the Brokerage Committee and is approved by the Board of Directors. Exemptions will be granted only to those members whose primary business is not the sale of residential property.

32. At all times material herein, the multiple listing operation conducted by the plaintiff operated generally in the following manner:

(1) A real estate broker enters into a contract with the owner of a property to act as his agent for the sale of such property under a written contract, the form of which has been approved by the plaintiff.

(2) The broker (hereinafter referred to as the "listing broker") entering into the contract with the owner forwards certain information regarding the property to be sold to the Board office, using for this purpose a form provided by the plaintiff which records details as to construction, lot size, amount of taxes, location with respect to schools, transportation availability to city conveniences, and the price at which offered. This form is required by the plaintiff's By-Laws to be sent within 48 hours of the time the contract is entered into by its member.

(3) The listing broker pays the Board $10 at the time he sends two copies of the detailed information referred to in the preceding paragraph.

(4) The plaintiff assigns an identification number to the property offered for sale and orders a picture of the property from a professional photographer who is hired by the plaintiff.

(5) The original copy of the detailed information of the offer is picked up by a printer hired by the plaintiff, and the photograph of the property described in the detailed information is sent to the printer.

(6) The printer prints a circular containing the detailed information on the property offered for sale, and mails a copy directly to all broker members of the plaintiff excepting those few who have been exempted from participation in the multiple listing operation. Normal distribution is one copy for each salesman, plus two copies for each office.

(7) The owner of the property and the listing broker select a day for the inspection of the house by other brokers, and the plaintiff's office is advised of the date selected. A list of properties open for inspection each week with the dates on which they may be inspected is prepared by the plaintiff's office each week and mailed to all participating broker members every Thursday. An exhibit in evidence, being a particular circular listing houses open for inspection, lists 28 houses open for inspection on June 13, 1961, and 30 open for inspection on June 14, 1961.

(8) Changes in the detailed information concerning the property for sale are reported, in writing, to the plaintiff's office on forms provided for the purpose by plaintiff. Typical of such changes are changes in price or terms at which the property is offered, withdrawal of the property from the market, sale of the property, availability of financing, or expiration of the listing. Twice weekly a report of changes is prepared and mailed by the plaintiff to all broker members' offices.

(9) When a property which has been listed is sold, the listing broker advises the plaintiff, on a form provided by it, at which time it pays the additional fees due. If the listing broker effects the sale (either solely or cooperatively through a nonmember), a fee of $2 is due the plaintiff, or a total of $12 (including the original listing fee). If the sale is effected cooperatively through another member broker, a fee of $14 is due ($2 from the listing broker and $12 from the selling broker) or a total (including the original listing fee) of $24. It is the listing broker's responsibility to collect and

remit to the plaintiff's office the selling broker's portion of the fee.

(10) Twice a month a catalog index is prepared and distributed by the plaintiff's office showing all properties currently offered for sale. This index sometimes may contain 30 pages or more.

(11) Each member brokerage office (active members) makes a payment of $7 per month to the plaintiff to cover the costs of the catalog index.

(12) Once each month a report of market activity is prepared by the plaintiff's office and mailed to each member's office.

(13) Once each month a sales report listing information showing closing date, address, last listed price, indicated sales price or revenue stamps, broker listed by, and broker sold by, is mailed to each member's office.

(14) The plaintiff arranges for the printing and pays the cost of all forms used in the multiple listing operations.

33. Under the plaintiff's system, all brokers must file a notice with the Board in which they declare their offices as operating under either a 60-40 or a 50-50 commission split. Formerly, when it was more difficult to sell real estate than to obtain an exclusive listing of property, most members operated under an arrangement giving the listing office 40 percent of the sales commission and the selling office 60 percent. In recent years, however, market conditions have changed so that it has been easier to sell property than to secure a listing for its sale. Consequently, most of the plaintiff's members now operate under a 50-50 commission split. The plaintiff's rules provide that in a sales transaction involving two brokers, one of whom operates on a 60-40 basis and the other on a 50-50 basis, the latter shall govern.

34. In 1948, the plaintiff had one employee who was its

executive secretary. At the time of the trial of this action, December 5, 1961, the plaintiff had five full-time employees and one part-time employee. It is a reasonable inference from the entire record that the increase in the number of employees was due in large measure to its operation of the multiple listing service.

35. The executive secretaries of real estate boards throughout the country, under the auspices of NAREB, have an organization called the Secretaries Council. Much of the activities of this Council are and have been directed to the exchange of information concerning the operation of multiple listing services. This Council publishes quarterly a publication entitled "Multiple Listing Digestaire.".

36. In the February 1954 issue of the above-described publication, the following article, headed "Multiple Listing —the Evanston Plan," appeared by the then chairman of the Brokerage Committee of the plaintiff real estate Board:

> It was just a year ago that the Evanston-North Shore Board of Realtors launched its central multiple listing system with a photographic reproduction of the property.
>
> Cooperation in the sale of properties in this area has been practiced many years by our board members. It has been the responsibility of each office to notify all other board members within fourteen days of the exclusive listings they had contracted. The re-typing of this listing information in each office was becoming a heavy burden: members' office staffs were bogged down, unable to keep ahead of the task. It seems quite reasonable that the listing information could be duplicated quicker, more complete, and certainly at a saving of time and expense if done at a central location and then distributed. These were the factors which brought our multiple listing system into focus.

Yes, we went through the usual processes every other board experiences in developing the mechanics best suited to our needs. And even after a plan was developed, and used, it became obvious that some readjustments were necessary—improvements could be made. It was then that we designed an original plan which is now known as the Evanston Plan.

For the first five months, the listings were serviced on a flat basis of a $20.00 listing fee per listing, paid in advance. This fee proved to be too heavy a charge and caused serious repercussions among the membership, with loud cries from the larger offices, who were contributing the bulk of the listings and felt that at least half the costs should be paid by recipients who were being supplied with a portfolio of listings free of charge and contributing little in return. On the other hand, most of the smaller offices were dead set against paying any considerable set fee for listings that they might not be able to use, although they were willing to pay for benefits as, if, and when received.

The tug-of-war between these factions was reaching a point where it threatened the continued existence of the Board as a working unit. A fortunate solution was evolved by basing the charges primarily on a "pay-after-the-deal-is-made" sales fee basis, combined with a returnable listing fee large enough to keep out the "dogs," plus a very nominal monthly service charge of only $5.00 per office for those offices actually engaged in the residential brokerage business.

The $10.00 Listing Fee, returnable when the deal is made, provides an operating reserve even when sales are few. The $12.00 per deal Sales Fee paid to the board office after each deal ($24.00 shared by each broker on cross deals) comes when the commission is paid and at a time when it is the least painful to pay. And the nominal monthly Service Charge of only $5.00 per office is reasonable enough not to hurt any office actively engaged in the brokerage business, no matter how small it is.

Our listing sheets are reproduced by a combined process of xerography and multilith. Listing information is reproduced direct from the typed forms furnished by the listing broker; these are not retyped in the board office. The offset printing work is farmed out, and the printer also does the mailing. (NOTE: See "Simplifying the Mechanics of Multiple Listing" in the Fall, 1952, MULTIPLE LISTING DIGESTAIRE.)

About four months ago a study was made on whether or not a reduction in the cost could be realized if the board purchased and operated its own multilith machinery. After several committee meetings and conferences with the printer, it was the unanimous conclusion of the Brokerage Committee that any possible savings would be more than counterbalanced by the uncertainty of experienced help, by the additional office space required for equipment and stock supplies, and by the general confusion and noise created by the operation of the machinery in the board office.

Listings are mailed to all members three times a week: Monday, Wednesday, and Friday. A report of the listing changes and sales is mailed twice a week: Tuesday and Friday. This latter report is mimeographed and mailed from the board office.

Recent studies of the past months' operations reveal that 55% of all sales are made by the broker selling his own listing, while 45% of the sales involve listing by one broker and selling by another. The lag between the listing time and the payment of the sales fee has turned out to be longer than was anticipated. For instance, the November listings: After four months, only 43% were reported as sold, 38% were still on the active market, and 19% had been withdrawn, rented or expired. At the end of six months, 49% were reported sold; 25% were still on the active market and 25% had been withdrawn, rented or expired.

A multiple listing system is built on mutual trust. Violations of the spirit of cooperation are felt by all

members, but most of all by the ones who take undue advantage and break the trust. Evanston and North Shore Realtors take real pride in their spirit of co-operation as demonstrated during this first years' operation. We believe the multiple listing service has cemented members of the board together on a more sound basis than ever before.

37. In 1956, the plaintiff's By-Laws regarding procedure on dissolution provided as follows:

ARTICLE VIII

Procedure on Dissolution

Section 1. Method.

In case of dissolution of the Board for any reason whatsoever, a Committee of five (5) shall be elected to liquidate all the tangible assets of said Board and divide the proceeds derived therefrom equally among the then Active and Active-Associate members of said Board.

As amended up to September 13, 1960, Article VIII of the By-Laws provided as follows:

ARTICLE VIII

Procedure in Dissolution

Section 1. Method.

In the event this Board shall at any time terminate its activities, the Board of Directors shall consider and adopt a plan of liquidation and dissolution, which said plan shall provide for the collection of all assets of the Board, the sale or other proper disposition of any real and personal property owned by the Board, the payment of all liabilities and the distribution of any surplus remaining to such non-profit charitable organiza-

tion or organizations as shall be selected by the Board of Directors.

38. The financial figures quoted in finding 14, which were before the Commissioner of Internal Revenue at the time his June 1960 ruling was made, furnish the best basis in the record for a recent year as to the source of plaintiff's revenue and its disposition.

39. Plaintiff has no shareholders or stockholders.

40. Plaintiff has never declared a dividend or made a distribution of any kind to its members.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is, therefore, dismissed.

APPENDIX C

Rev. Rul. 59-234, 1959-2 Cum. Bull. 149:

> A real estate board whose primary purpose or activities is the operation of a multiple listing system is considered to be rendering particular services for its members and is not exempt from Federal income tax as an organization described in section 501(c)(6) of the Internal Revenue Code of 1954.

Advice has been requested whether the operation of a multiple listing system by an otherwise exempt real estate board will cause it to be denied exemption from Federal income tax as an organization described in section 501 (c)(6) of the Internal Revenue Code of 1954.

The instant real estate board, in addition to carrying on functions similar to those of organizations ordinarily exempt under section 501(c)(6) of the Code, operates a multiple listing service for its members. The stated purpose of such service is (a) to assist members of the board in rendering better service to the public by creating a broader and more active market for real estate; (b) to stimulate and facilitate the transaction of business between members of the board through cooperation and exchange of exclusive listings; (c) to provide a medium through which real estate may be merchandised more efficiently and expeditiously to the advantage of both buyer and seller; and (d) to encourage realtors to uphold high standards of business practice and to further educate them in adhering to the principles of the Realtors' Code of Ethics. Active members, salesmen members and nonresident members of the board in good standing may participate in the service.

The actual function of the multiple listing system in the instant case involves the listing of property for sale by an owner with a real estate broker, under an exclusive listing

contract," which becomes available to all other broker-members of the board. Upon receipt of a listing the board forwards it, with all pertinent information, to its other broker-members. Such listings become the property of the board for a stated period of time, and, upon a sale during this period, a certain percentage of the normal commission is allocated to the board as a fee or commission, the remainder being divided between the selling and listing brokers pursuant to a prearranged schedule. The board also receives specified fees for the distribution, withdrawal and publication of listings. Certain penalties may be imposed for infractions of the rules of the board governing the operation of such service.

Receipts of the board consist of initiation fees and membership fees, fees relating to the operation of the multiple listing service, interest, and income from the sales of literature relating to real estate. The expenditures include salaries and wages, printing, office supplies, photographic expenses and miscellaneous operating expenses. It is shown that the multiple listing service accounts for 75 percent of the board's income and 80 percent of its expenses.

Section 501(c) of the Internal Revenue Code of 1954 describes certain organizations exempt from income tax under section 501(a) and reads, in part, as follows:

(6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(6)-1 of the Income Tax Regulations provides, in part, as follows:

A business league is an association of persons having some common business interest, the purpose of which is to

promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league.

• • •

The questions for determination are whether the operation of the multiple listing service by the instant real-estate board constitutes the performance of particular services for individual persons and whether the operation of a real estate multiple listing service is a business of a kind ordinarily carried on for profit, both within the meaning of section 1.501(c)(6)-1 of the regulations. It is apparent that the multiple listing system as operated by real estate boards is inherently designed for the rendering of particular services for individual members as a convenience and economy in the conduct of their respective businesses. Therefore, the instant organization, instead of primarily engaging in activities for the improvement of business conditions within the real estate business generally, is performing particular services for its members through the maintenance and operation of its multiple listing system by providing them with listings of properties for sale, which serve them as a convenience and economy in the conduct of their businesses. It is further concluded that the operation of a

real estate multiple listing service constitutes a business of a kind ordinarily carried on for profit.

Accordingly, it is held that, where the primary purpose or activity of a real-estate board is the operation of a multiple listing system, the real-estate board is not entitled to exemption from Federal income tax as an organization described in section 501(c)(6) of the code.

Ruling and determination letters which have been issued granting exemption from income tax under section 501(c)(6) of the Code to such real-estate boards will be revoked. However, such revocations generally will not be retroactive prior to January 1, 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 736

EVANSTON-NORTH SHORE BOARD OF REALTORS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A3–A17) is reported at 320 F. 2d 375. The court's findings of fact (Pet. App. A17–A39) are not reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1963 (R. 27), and a motion for rehearing was denied on October 11, 1963 (R. 79). The petition for a writ of certiorari was filed on January 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below erred in holding that petitioner did not qualify for tax exemption as a real-estate board under Section 501(c)(6) of the 1954 Code because its principal activity was the operation of a multiple listing service for the benefit of its individual members.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.
>
> (a) *Exemption From Taxation.*—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.
>
> * * * * *
>
> (c) *List of Exempt Organizations.*—The following organization are referred to in subsecsection (a):
>
> * * * * *
>
> (6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.
>
> * * * * *

Treasury Regulations on Income Tax (1954 Code):

> Sec. 1.501(c)(6)-1 *Business leagues, chambers of commerce, real estate boards, and boards of trade.*
>
> A business league is an association of persons having some common business interest, the

purpose of which is to promote such common business interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. An asspciation engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of Section 501(c)(6) and is not exempt from tax. Organizations otherwise exempt from tax under this section are taxable upon their unrelated business taxable income. See part II (section 511 and following), subchapter F, chapter 1 of the Code, and the regulations thereunder.

STATEMENT

The facts as found by the Court of Claims (Pet. App. A17–A39) may be summarized as follows:

Petitioner was formed in 1936 as a non-stock, non-profit Illinois corporation (Pet. App. A17). According to its articles of incorporation, its purposes were generally those of a conventional real-estate board (Pet. App. A17–A18). Its membership, numbering 581 during the year in suit, is basically limited to real estate brokers and salesmen operating in the Evanston and North Shore area of suburban Chicago (Pet. App. A18). By a letter dated January 13, 1942, the Commissioner advised petitioner that, on the basis of the information it had submitted, it qualified for exemption as a real-estate board under Section 101(7) of the 1939 Code, which is virtually identical to Section 501(c)(6) of the 1954 Code (Pet. App. A20).

Following a review of petitioner's exempt status beginning in 1957, and after additional information was requested and conferences held, the Commissioner advised petitioner on June 10, 1960, that its exempt status was terminated effective June 30, 1958, the end of petitioner's 1958 fiscal year (Pet. App. A20–A24). The ground on which the Commissioner revoked his prior ruling was stated in the letter issued by him on June 10, 1960 (Pet. App. A24–A25):

> By letter dated December 5, 1957, you were advised that we proposed to revoke our above exemption rulings because of a conclusion that your primary activity is the operation of a multiple listing system, which activity results in the performance of particular services for indi-

vidual persons and is a business of a kind ordinarily carried on for profit. As you have since been apprised, such conclusion reflects the Service position set forth in Revenue Ruling 59-234, Internal Revenue Bulletin 1959-28, 11, which reads, in part, as follows:

> "* * * It is apparent that the multiple listing system as operated by real estate boards is inherently designed for the rendering of particular services for individual members as a convenience and economy in the conduct of their respective businesses. Therefore, the instant organization, instead of primarily engaging in activities for the improvement of business conditions within the real estate business generally, is performing particular services for its members through the maintenance and operation of its multiple listing system by providing them with listings of properties for sale, which serve them as a convenience and economy in the conduct of their businesses. * * *"

The 1960 ruling letter also contained a statement setting forth the reasons why the Commissioner had determined that a multiple listing service resulted in the performance of particular services for individual persons (Pet. App. A25-A26):

> With reference to the question of whether the multiple listing system results in the performance of particular services for individual persons, the National Association of Real Estate Boards, as quoted above, has described the system as "a medium through which real estate may be merchandised efficiently" and as a "tremendous merchandising method." Fur-

> ther, listings are considered a "stock in trade." It is also pertinent to note that although you contend that the real estate business and the community as a whole benefit therefrom, the systems are supported by payments of a portion of the income which specific realtors derive from the existence of the system. We hold, therefore, that the principal purpose of the system is to furnish salable property to those realtors who participate in the program, which purpose is clearly aimed at the benefit of the participants in their individual capacities rather than the quasi-public, semi-civic benefit of the business community as a whole in the manner contemplated by the applicable Income Tax Regulations.

After the 1960 ruling, the District Director at Chicago proposed a deficiency of $3,510.89 in federal income taxes for the fiscal year June 30, 1959. On February 28, 1961, petitioner paid that amount together with interest of $324.76 (Pet. App. A26).

On March 13, 1961, petitioner filed a timely claim for refund of all taxes and interest paid for 1959. The sole basis of recovery asserted in the claim was that petitioner was exempt from taxation as a real-estate board under Section 501(c)(6) of the Internal Revenue Code of 1954. On March 23, 1961, the Commissioner formally disallowed the claim and six days thereafter, on March 29, 1961, petitioner filed the instant suit (Pet. App. A27).

The Court of Claims found that a substantial part of petitioner's activities consisted of rendering serv-

ices to its individual members through the operation of a multiple listing service, and accordingly held that petitioner did not qualify for exemption from income tax as a real-estate board under Section 501(c)(6) of the Internal Revenue Code of 1954 (Pet. App. A12–A13, A16–A17).

ARGUMENT

1. Section 501(c)(6) of the 1954 Code, *supra*, pp. 2–3, exempts real-estate boards from taxation if they are not organized for profit and if no part of their net earnings inures to the benefit of their members. The applicable Treasury Regulations provide that, in order for an organization to qualify for exemption under Section 501(c)(6), "its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons." Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(6)–1, *supra*, p. 2. This language has remained unchanged through repeated statutory reenactments since it was first adopted in 1929 (Treasury Regulations 74 (1929 ed.), Art. 528)[1] and thus has acquired virtually the status of statutory law.

[1] Treasury Regulations 74 (1929 ed.), Art. 528; Treasury Regulations 77 (Revenue Act of 1932), Art. 528; Treasury Regulations 86 (Revenue Act of 1934), Art. 101(7)–1; Treasury Regulations 94 (Revenue Act of 1936), Art. 101(7)–1; Treasury Regulations 101 (Revenue Act of 1938), Art. 101(7)–1; Treasury Regulations 103 (1939 Code), Sec. 19.101(7)–1; Treasury Regulations 111 (1939 Code), Sec. 29.101(7)–1; Treasury Regulations 118 (1939 Code), Sec. 39.101(7)–1; and Treasury Regulations on Income Tax (1954 Code), Sec. 1.501(c)(6)–1.

Automotive Electric Ass'n v. *Commissioner*, 168 F. 2d 366, 367 (C.A. 6); *Apartment Operations Ass'n* v. *Commissioner*, 136 F. 2d 435, 436 (C.A. 9). Consequently, an organization is not exempt if its purpose is in large part to render valuable services to its members, because then the net earnings of the organization inure to the benefit of its members. See, *e.g.*, *General Contractors' Ass'n* v. *United States*, 202 F. 2d 633, 636 (C.A. 7); *Northwestern Municipal Ass'n* v. *United States*, 99 F. 2d 460, 463 (C.A. 8); *Northwestern Jobbers' Credit Bureau* v. *Commissioner*, 37 F. 2d 880, 883 (C.A. 8); *Apartment Operations Ass'n* v. *Commissioner*, 136 F. 2d 435 (C.A. 9); *Produce Exchange Stock Clearing Ass'n* v. *Helvering*, 71 F. 2d 142 (C.A. 2); Rev. Rul. 59–234, 1959–2 Cum. Bull. 149.

The Court of Claims resolved the crucial factual questions so as to require denial of the exemption to petitioner. The court found that petitioner's multiple listing service performed a valuable service to its individual members and that, since the operation of this service was a substantial part of petitioner's activities, the purpose of the organization was also substantially to give service to its members (Pet. App. A12–A13). These findings are amply supported by the evidence: the fees charged for the listing service are in approximate proportion to the benefits received by each member (Pet. App. A9); participation in the listing service is limited to members (Pet. App. A10); the industry regards the listing service as a "sales tool" (Pet. App. A10–A11); a listing service is analogous to a stock or commodity exchange (Pet. App. A11–A12); and the listing service accounted for

approximately half of petitioner's total receipts and expenditures [2] and required the time and effort of most of its employees (Pet. App. A13–A14, A22–A23, A39).

2. Petitioner's principal contention is that an organization, such as a real estate board, is exempt, even though most of its activities would not warrant independent exemption, if it has an exempt purpose and all its earnings are used for this purpose. This argument assumes that a listing service is a non-exempt activity. Petitioner nonetheless claims that it is entitled to exemption since it has the exempt purpose of serving the common interest of its members and all the earnings of the listing service are used for this purpose.

Even if petitioner were correct that an organization is exempt if it has an exempt purpose even though most of its activities were non-exempt (but see, *e.g.*, *Scripture Press Foundation* v. *United States*, 285 F. 800 (Ct. Cl.), certiorari denied, 368 U.S. 985), here, as we have seen, petitioner did not have an exempt purpose. The Court of Claims found that petitioner's main activity was non-exempt—*i.e.*, providing a valuable listing service for its members—and that therefore the main purpose of the organization was non-exempt. While the purpose of an organization may perhaps be different from its main activity in some circumstances (see *Texas Mobile Home Ass'n* v. *Commissioner*, C.A. 5, decided November 21, 1963), here there was no such evidence.

[2] Of petitioner's $94,652.77 gross income for fiscal year 1956, $57,381 was derived from the operation of the listing service. Of total expenses of $76,654.70 for the same period, $32,591.50 is directly allocable to the listing service, as is a substantial portion of $16,339.11 paid for salaries (Pet. App. A13).

The cases cited by petitioner establish, at the very most, that an organization may be exempt if it has an exempt purpose even though a substantial part of its activity is not exempt. Since, as we have seen, petitioner was found not to have an exempt purpose, these cases are inapposite. Moreover, most of these cases do not support petitioner's legal position. In *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, an exempt religious organization undertook as a minor part of its activities to sell wine and chocolate to its member churches, from which activities it received a small amount of income. In holding that the organization did not lose its exemption, the Court noted that such "limited trading, if it can be called such, is purely *incidental* to the pursuit of those [religious] purposes, and is in no sense a distinct or external venture" (emphasis added). *Id.* at 581. While the Court stated that the question of exemption turned upon the destination of the receipts, not their source (*ibid*), the Court was there speaking of the passive investment income which formed the great bulk of the organization's receipts. Similarily, in *Commissioner* v. *Chicago Graphic Arts Federation, Inc.*, 128 F. 2d 424 (C.A. 7), and *Crooks* v. *Kansas City Hay Dealers' Ass'n*, 37 F. 2d 83 (C.A. 8), the organizations were held exempt since their nonexempt activities were found to be merely incidental or subordinate to the organizations' exempt activities. See also *General Contractors' Ass'n* v. *United States*, *supra*, 202 F. 2d at 638.

The plain implication of *Sagrada Orden* and the lower-court decisions cited above is that a corporation

whose nonexempt activities are more than "purely incidental" is not within the exempt class even though it also performs tax exempt activities. Here, over half petitioner's receipts and about half its expenditures related to the listing service (Pet. App. A13–A14, A22–A23, A39). In short, the very reason which impelled this Court in *Sagrada Orden* to hold that the organization there involved was exempt compels the opposite conclusion here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1963

No. 736

EVANSTON-NORTH SHORE BOARD OF REALTORS,
an Illinois not-for-profit corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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This reply is filed to call the Court's attention to the misrepresentation involved in respondent's contentions that the Court of Claims found that petitioner's over-all purpose was "to give service to its members" and that "the main purpose of the organization was non-exempt." (Resp. Br. 8, 9 and 10).

The Court of Claims made no such findings. In fact, the Court of Claims failed to make *any* findings on the subject of petitioner's over-all purpose or its purpose in undertaking the so-called multiple listing service, even though

these issues were the subject of extensive, uncontroverted evidence and crucial to a determination of petitioner's claim of exemption.

The Court of Claims failed to make such findings as a natural consequence of the erroneous legal test of exemption urged by respondent, adopted by the Court of Claims and now repeated in the brief in opposition to the petition for certiorari. Under this test of exemption, if an otherwise exempt organization undertakes an activity which is not in itself exempt and which produces a substantial cash flow on the organization's books and accounts for a substantial portion of the organization's clerical employees' time, the organization loses its exempt status even though it may exist for an exempt purpose and carry on the non-exempt activity to achieve this end.

Applying this erroneous legal standard, the Court of Claims did not find that petitioner had abandoned its exempt purpose, but rather that because one of its substantial activities (in these accounting terms) was not exempt, the over-all purpose for which plaintiff existed and carried on this and its other activities was immaterial.

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